United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

295

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 22,506

ROBERT LARRY ADAMS,

Appellant,

v.

ROBERT S. McNAMARA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

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January 31, 1969

QUESTION PRESENTED

Whether revocation of appellant's industrial security clearance, essential for employment in his field of training and experience, violated Defense Department regulations, Executive Order 10865, or the Due Process Clause where:

1. The revocation was based on a report by Naval Intelligence agents who coercively interrogated appellant without counsel for seven hours.

2. The revocation was based on a written statement purporting to relate the substance of conversations between appellant and the writer of the statement where appellant testified under oath that the statement was untrue but was not afforded an opportunity to confront and cross examine the writer of the statement.

3. The revocation was based on alleged homosexual acts, where the Secretary has no clear standard for evaluation and where no findings or conclusions were entered showing a need for the Secretary's action.

This case has not been before this Court before.

I N D E X

TABLE OF AUTHORITIES

Statutes:

*Cases principally relied upon.

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court over the instant case was founded upon the judicial review provisions of the Administrative Proceedure Act, 5 U.S.C. Secs. 702 and 704 and the Declaratory Judgment Act, 28 U.S.C. Sec. 2201. This Court's jurisdiction to review the District Court's judgment rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellee, hereinafter referred to as "the Secretary," revoked the security clearance which appellant held for a number of years. As a result of that revocation, appellant, a civilian, immediately lost the position he had held in a private company for five years. He has, since the revocation, been unable to obtain employment that utilizes his training and experience and in which he is professionally interested. Appellant sought a declaration from the District Court that the revocation was unlawful and sought a summary judgment. The District Court summarily, i.e., without findings or opinion, granted the Secretary's cross motion for summary judgment (JA. 1). This appeal followed.

Appellant, now 31 years old, became interested in electronics when he was eleven or twelve years old.[1/] He pursued this interest with diligence, received awards in state-wide science fair competition when he was in high school and, because of the sophisticated and innovative projects which he

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1/ Appellant's background and the chronology of events leading to this action are set out here in brief summary. Appellant's affidavits (JA. 19 - 26 and JA. 27-35) provide greater detail of background and events.

developed, won the Bausch and Lomb Science Award for the most outstanding achievement in science by a member of his senior class. (See JA. 19-21).

After graduation from high school, in 1957, appellant immediately obtained employment at Melpar, Inc., an electronics engineering firm in Alexandria, Virginia, as an assistant technician. He was issued a secret level security clearance by the Secretary and during the course of that employment he worked on several classified projects. He was promoted to tehcnician while at Melpar.

After a year at Melpar appellant had accumulated the funds necessary for matriculation at Virginia Polytechnic Institute as an electrical engineering major where he remained for a year until lack of funds dictated return to employment. He continued his college education at night school.[2/] He again obtained employment as a technician at an electronics firm, a secret level security clearance, and worked on classified projects. After six months, he was promoted to junior engineer and his salary doubled. In 1961, he obtained employment at National Scientific Laboratories, Inc., as a junior engineer. He held that position until his clearance was suspended in 1966. Except for the period at V.P.I. and a period when he was on active duty in the Army,[3/] appellant continuously held a secret level clearance from 1957 to 1966. See appellant's affidavit, JA. 20-21.

2/ Since leaving V.P.I. appellant has attended night school regularly at the George Washington University and the University of Virginia's extension service.

3/ Appellant is still a member of a U.S. Army Reserve control group consisting of individuals who are critically skilled in the national interest.

In 1962, he was asked by his employer to complete a questionnaire which was submitted by his employer to the Department of Defense as part of an application for a top secret clearance.[4/] Appellant continued to hold a secret clearance and was not further contacted concerning the application for a top secret clearance for two years when he was advised by his employer's security officer that there were some possible errors on the questionnaire and that he was to report to the office of Naval Intelligence, Potomac River Naval Command on July 30, 1964, to discuss these errors. See appellant's affidavit, JA. 27.

Instead of a discussion of errors on the two year old questionnaire, the meeting turned out to be a seven hour interrogation of appellant by two special agents of Naval Intelligence concerned solely with appellant's sex life and attitudes. During the interrogation, he was subjected to every psychologically coercive practice described by the Supreme Court in Miranda v. State of Arizona, 384 U.S. 436 (1963). The legal consequences of that interrogation are an issue in this proceeding.

Nearly a year passed following the interrogation and appellant continued to work on classified projects, when without advance notice and without personal notice to him, he was advised by his employer that the secret clearance which he had held for nearly ten years had already been withdrawn. Advised by his employer that he could resign, be fired, or take a leave of

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4/ The questionnaire is JA. 117-122.

absence, he opted for a leave of absence and signed a letter to that effect which was prepared by his employer's security officer. See appellant's affidavit, JA. 34.

After the clearance suspension and loss of appellant's employment were fait accompli appellant was advised, in a letter dated May 28, 1965 from the Secretary's deputy assistant for security policy (JA. 47), that the Secretary's Industrial Personnel Access Authorization Screening Board had determined that a top secret clearance was not "warranted" and that access, by appellant, to any category of classified information (including the secret clearance he had held for ten years) was not authorized. Accompanying the letter was the Screening Board's "Statement of Reasons" (JA. 50). The Board charged that appellant had acknowledged to his interrogators[5/] that he "...had engaged in numerous acts of sexual perversion beginning when [he was] 14 years of age and continuing up to [July 30, 1964]." The Screening Board also charged that in 1962 he had solicited John Rhodes Michael "...to engage in unlawful and immoral acts of sexual perversion." The Statement of Reasons contained a rote recitation of four of the twenty one "Criteria for Application of Standard in Cases Involving Individuals" which are contained in the Secretary's regulations.[6/]

5/ The Statement of Reasons charges (JA. 50) that on July 30, 1964, he made "acknowledgements" to "several persons." Although appellant did not know it, the interrogation was tape recorded. There were, however, only two agents present.

6/ Sec. III. B., 25 Fed. Reg. 14399 (1960). Because the regulations have been amended subsequent to revocation of appellant's clearance, reference is to the Federal Register rather than to the Code of Federal Regulations. For the Court's convenience, a copy of the applicable regulations is contained in the Joint Appendix (JA 129-158).

The criteria represent the Board's conclusions. Subsequently, the Secretary's deputy assistant secretary provided appellant with further details concerning the Screening Board's charges (JA. 51-52). Appellant submitted a sworn answer to the Statement of Reasons in which he denied the charges. (JA. 53-55).

A proceeding was held before a field board (a single examiner) at which appellant and one of his interrogators testified and at which the agents' summary report of the interrogation, JA. 60-63, and a statement from one John Rhodes Michael, JA. 65-68, was received. 7/ Michael did not appear. Appellant testified that the Michael statement was untrue. He also testified that the duress during his own interrogation was so great that he had agreed to say what the agents wanted him to say, and that the agents' report of the interrogation was a result of coercion, did not reflect what he had said, and was, in any event, untrue. At the field board proceeding, the Secretary's counsel acknowledged that his file reflected that during the course of an investigation of persons interviewed"...11 professed to have known him for varying periods of time from his birth up until the present time in the capacity as neighbors, friends, and fellow workers, and all recommend him for a position of trust and responsibility" (JA. 56).

7/ Reliance upon the Michael statement is an issue in this proceeding. The statement purports to relate Michael's recollection of conversations that he had with appellant two and one half years before the date of the statement, i.e.: "I [Michael] began to suspect him as a homosexual because of certain inferences he made. Finally he made several verbal approaches to me which I refused. By verbal approaches, I mean he asked me to have homosexual relations with him" (JA. 66).

Four months after the Field Board proceeding, appellant's counsel was advised in a letter from the Secretary's deputy assistant for security policy dated April 7, 1966, JA. 56, that "[t]he Central Board proposes to find against your client as to all allegations, conclusions, paragraphs and the Criteria of the [Screening Board's] Statement of Reasons." No findings or conclusions by the Field Board examiner were available to appellant. On May 23, 1966 an oral argument proceeding was held before the Central Board composed of three military officers at which appellant's counsel argued. The Secretary's deputy assistant then advised appellant's counsel in a letter dated July 29, 1966, JA. 58, that "...the Board found against Mr. Adams with respect to each allegation, paragraph and Criterion of the [Screening Board's] Statement of Reasons...".

The only findings and conclusions concerning appellant's threat to the security of his nation to be found in this record is the Central Board's adoption, in toto, of the pre-adjudication Statement of Reasons.

The record reflects that appellant made significant professional progress from 1957 to 1965 while he held a secret clearance and that this professional progress was particularly accelerated during the periods 1961 to 1965. See JA.21-24.The record also reflects that by 1966, when his clearance was suspended, appellant had become a highly experienced and trained expert in specialized areas of physics and electronics. See JA.23 -25 . As a result of the loss of his clearance, he immediately lost his employment and is unable to obtain a position that utilizes his training and experience or that is of professional

stature comparable to the position he held when his sexurity clearance was revoked. He is effectively precluded from working in the areas of physics and electronics in which he is progessionally interested. See JA. 25.

SUMMARY OF ARGUMENT

Point I:

In 1962, appellant, for a number of years the holder of a secret level security clearance necessary for his employment and profession, was directed by his employer to complete a questionnaire which was submitted to the Secretary as part of an application for a top secret clearance. Two years later he was advised by his employer that there were possible errors in the questionnaire and he was directed to go to the office of Naval Intelligence to clear up the errors. Instead of the discussion of errors which appellant had been led to expect, the appellant was interrogated for seven hours by two special agents of Navl Intelligence. The interrogation was concerned solely with the most intimate details of appellant's sexual activity and attitudes. During the course of the interrogation appellant was intimidated and coerced and he was effectively refused the right to remain silent. He was subjected to every interrogation practice which the Court found inherently coercive in Miranda v. State of Arizona, 384 U.S. 436 (1966). The Secretary relied upon his special agents' report of the interrogation to revoke appellant's security clearance.

In Greene v. McElroy, 360 U.S. 474 (1959), the Court held that the right to hold specific private employment and to follow a chosen profession comes within the property and liberty concepts of the Fifth Amendment. The Court further held that revocation of a security clearance affects those protected rights and that the Secretary's security clearance program must comport with the requirements of due process of law. The interrogation to which appellant was subjected and revocation of appellant's security clearance on the basis of the special agents' summary report of that interrogation were repugnant to due process of law requirements and were, as well, inconsistent with the President's direction to the Secretary in Executive Order 10865.

Point II:

The Secretary relied upon the written statement of one John Rhodes Michael as a basis for revoking appellant's security clearance. The statement purports to relate the substance of conversations between Michael and appellant which occurred two and one half years before the statement was written.

The Michael statement which contains nothing but vague allegations, inference and innuendo provided a testimonally infirm basis for depriving appellant of rights protected by the Constitution of the United States. The Secretary's failure to afford appellant the right to confront and to cross examine Michael was inconsistent with the requirements of due process of law, the Secretary's Regulations, and the President's explicit direction to the Secretary contained in Executive Order 10865.

Point III:

The Secretary has directed his adjudicators, military officers, to use their common sense in determining whether security clearances should be revoked. That direction results in confusing and inconsistent results. The Secretary's failure to enunciate applicable standards with any degree of specificity is inconsistent with the requirements of due process of law. The lack of standards is further aggravated by the fact that the Secretary's adjudicators did not make any findings or conclusions that demonstrated that their action was required by the national interest. The adjudicators' failure to make findings or conclusions or to specify a non-speculative necessity for their action was inconsistent with the requirements of due process of law.

ARGUMENT

I. REVOCATION OF APPELLANT'S SECURITY CLEARANCE ON THE BASIS OF A REPORT BY THE NAVAL INTELLIGENCE AGENTS WHO COERCIVELY INTERROGATED APPELLANT WITHOUT COUNSEL VIOLATED EXECUTIVE ORDER 10865 AND THE DUE PROCESS CLAUSE.

One of the two reasons given by the Screening Board for suspension of appellant's security clearance and adopted by the Central Board as a reason for revocation of that clearance is that appellant "acknowledged numerous acts of sexual perversion" when he was interrogated on July 30, 1964 (Statement of Reasons, JA. 50, adopted by the Central Board, JA. 58).

In September, 1962, the private company employing appellant instructed him to complete a security questionnaire.[8/] The questionnaire, JA. 117, was submitted by the employer to the Department of Defense as part of an application for a top secret security clearance. Two years passed and appellant continued his employment with the secret clearance he had held since 1957. In late July, 1964, appellant was advised by his employer's security officer that there were possible errors in the questionnaire and appellant was instructed to go to the Office of Naval Intelligence, Potomac River Naval Command to clear up the errors. When he arrived at the intelligence office he was fingerprinted and subjected to a seven hour interrogation by two special agents of Naval Intelligence about his sexual

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8/ Appellant's account of events prior to the interrogation are in his affidavit, at JA. 27.

activities and attitudes.[9/]

Appellant was advised by his interrogators of the Fifth Amendment's proscription against compelled self incrimination and was apparently advised that it was his constitutional right to not answer questions.[10/] Having given that warning, the interrogators promptly proceeded to rob the warning of meaning and to actually refuse appellant that right by bearing down on him with a storehouse of coercive practices. As will appear herein, the duress to which appellant was subjected was terrifying and complete.

A. The Coercion to Which Appellant was Subjected:

In Miranda v. State of Arizona, 384 U.S. 436 (1966), the Court analyzed the efficacy of the self incrimination warnings given to criminal suspects in

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9/ Although appellant was not so advised, tape recorders were concealed in the rooms where he was interrogated. After the motion for summary judgment was filed in the District Court, appellant's counsel was for the first time advised that the tapes are still in the Secretary's possession. Appellant's version of what occurred at the interrogation is contained in his affidavit, JA. 27-35. The Secretary did not file the tapes or a transcript of the tapes in the District Court. Instead, he filed affidavits from the interrogators. One of the interrogators, Agent Schlichtman, recites in his affidavit, JA. 115, that he cannot remember the interrogation. In his affidavit, JA. 110-114, Agent Beene does not materially differ with appellant's account of the interrogation.

10/ In his affidavit, JA. 110, Special Agent Beene relates that appellant was "...advised of his rights regarding self incrimination as set forth in the Fifth Amendment to the Constitution of the United States...". Agent Schlichtman relates, JA. 116, that although he could not remember appellant's interrogation "[i]t was standard practice to apprise any civilian interviewee of the Fifth Amendment to the Constitution of the United States regarding self incrimination and his right not to answer questions."

view of police interrogation proceedures which followed such warnings. The opinion in Miranda contains, at 384 U.S. 448-456, a compendium of psychologically coercive interrogation practices which led to the Court's holding that a warning of Fifth Amendment rights was not alone sufficient to protect those rights and that the presence of counsel at such interrogations was an essential element of an individual's right to remain free from compelled self incrimination. See, also, Escobedo v. State of Illinois, 378 U.S. 478 (1964). While not all of the interrogation practices described in Miranda were used to induce confessions from Miranda or his three fellow petitioners, it appears that all of those practices were utilized in the interrogation of appellant. Therefore, some of the coercive practices reviewed by the Court are placed in juxtaposition with appellant's experiences at the hands of his government interrogators:

"The 'principal psychological factor contributing to successful interrogation is privacy - being alone with a person under investigation'." 384 U.S. 449. Compare appellant's affidavit, JA. 28, par. 5. "The officers are instructed to minimize the moral seriousness of the offense." 384 U.S. 450. Compare appellant's affidavit, JA. 29, par. 7 and Agent Beene's affidavit, JA. 111, par. 5. The officers should display a confidence in the suspect's guilt. He is merely confirming details. Explanations to the contrary are dismissed or discouraged. 384 U.S. 450. Compare appellant's affidavit, JA. 30, par. 8 and Agent Beene's affidavit, JA. 113, par. 11. The interrogator should

create an "oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease." 384 U.S. 451. Agent Beene testified at the Field Board proceeding, Tr. 31-32, 39-40, JA. 89, 92-93:

> "Q. Isn't it a fact that you [Agent Beene] developed a certain sense of hostility towards the applicant?
> A. I don't think so; no, sir.
> Q. Is there anything about Mr. Schlichtman's demeanor that suggested that he had any animosity against the applicant?
> A. His questioning was rather persistent. This could be construed as hostile, I suppose."
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> * * *
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> "Q. ...Did the applicant appear nervous at any time during the interview?
> A. Yes, sir, he did.
> Q. And in what manner did this nervousness manifest itself that you could see?
> A. He was very hesitant in answering many of the questions. At times, his voice was a trembling voice somewhat. At times, he would be blush in the face.
> Q. Mr. Schlichtman's questioning was at times loud and insistent, was it not?
> A. At times, yes.
> Q. In point of fact, he appeared to become angry, did he not?
> A. Perhaps. Perhaps it could be construed as anger or hostility."

Agent Beene relates in his affidavit, JA. 114, par. 13, that: "[d]ue to the fact that [appellant] was nervous, it was often necessary to drag information from him piecemeal rather than through a casual chat or conversation."

"He should interrogate for a spell of several hours pausing only for the subject's necessities...". 384 U.S. 451. Compare appellant's affidavit, JA. 30, par. 9. The interrogator is "told to point out the incriminating aspects of the suspect's refusal to talk." 384 U.S. 454. Compare appellant's affidavit, JA. 29 , and Agent Beene's affidavit, JA.111, par. 4. "[I]f the subject asks for an attorney or relative the investigator accedes, which has an undermining effect, but the officer is directed to point out the 'incriminating aspects of the suspect's refusal to talk'". 384 U.S. 453. Compare appellant's affidavit, JA.31, par. 11, and Agent Beene's affidavit, JA.112,par. 8. "The interrogator suggests that the subject first tell the truth to the interrogator rather than to get anyone else involved in the matter." 384 U.S. 454. Compare appellant's affidavit, JA.31, par. 11 and Agent Beene's affidavit, JA.113,par. 11. "The police then persuade, trick, or cajole him out of exercising his constitutional rights." 384 U.S. 454. Compare appellant's affidavit, JA.29, par.6.[11/] The Court also described the "friendly-unfriendly" interrogators ploy or the "Mutt and Jeff Act." 384 U.S. 452. Compare appellant's affidavit, JA. 30, par. 10.

After reciting these interrogation practices, the Court, at 384 U.S. at 455 and 457-458, concluded that:

> "To obtain a confession, the interrogator must 'patiently maneuver himself or his quarry into a position from which the desired objective may be obtained'" (footnote ommitted).

* * *

11/ See appellant's affidavit, JA. 29, par. 6, i.e., "During the couse of the interview the agents made it clear that anything I told them was a secret between myself and the government and no one else would know, and the implication was clear that as long as the government knew everything it would be all right. The agents also stated that the agents just wanted this information for the records."

> "[i]t is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity (footnote omitted). The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles - that the individual may not be compelled to incriminate himself."

And, see footnote 26, at 384 U.S. 457.

Nor was appellant free to leave the place of his interrogation or free himself from his interrogators. The Court, in Miranda, at 384 U.S. 444, defines custody as "...depriv[ation] of...freedom of action in any significant way" and at 384 U.S. 474-475:

> "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in custody interrogation operates on the individual to overcome free choice in producing a statement after that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." (Emphasis supplied).

Agent Beene's testimony at the Field Board proceeding 12/ is illuminating, i.e.:

12/ At Tr. 27, 30, 48-49., JA. 87, 88, 94-95.

"Q. Did either you [Agent Beene] or Mr. Schlichtman tell the applicant at the outset that he was not required to remain and submit to an interview?
A. I don't recall whether he was told at the outset or not.
Q. Was he told at any later point during the interview?
A. I definitely recall telling him this after lunch."

* * *

"Q. [Is there a standard operating procedure]...[a]s to the matter of informing the applicant whether he is obliged to be interviewed or not?
A. Of course, if the applicant asked if he is obliged, the answer would be no."

* * *

"Q. Did either your or Mr. Schlichtman make any effort to persuade the applicant to continue answering questions?
A. Yes.
Q. What efforts were these?
A. We continued asking him questions, directed questions to him.
Q. Did you do anything else?
A. No.
Q. Did he attempt to leave?
A. Yes, he did.
Q. What did you do to restrain him, if anything?
A. Continued asking him questions. May I expound a bit? He got up and went to the door several times and I believe the door was open during these interviews, and we asked one question and he would come back in the room and stand for awhile. And sometimes [he] sat down and got up and went to the door again."

In his affidavit, JA. 110-112, pars. 3 and 9, Agent Beene relates that:

"On at least one occasion, Adams stated that if he could go home and think things over he might recall events more clearly. It was suggested to him that it would be better to answer all the questions and get the investigation over with at that time.

* * *

"I recall that on several occasions Adams stated that he would like to have time to think about this matter before additional questioning. On each of these occasions it was suggested to Adams that it would be better to conclude the matter at the time of the interrogation rather than to put if off until a later date."

Nor did the agents' report of the interrogation provide a testamonially sound basis for an action that deprived appellant of basic rights. It is apparent that words were put in appellant's mouth at the interrogation, and the report reflects not only dictated answers to the agents' questions 13/

13/ For example, the agents' report of the interrogation, JA.61, recites:

"Subject related that he laid down on top of DURLEY and began moving his body in an attempt to reach sexual gratification".

However, Agent Beene, at the personal appearance proceeding, Tr. 35-36, JA.90-91, testified as follows concerning appellant's response to questions concerning an event that occurred when appellant was 15 or 16 years old:

"Q. Did you have occasion to interview Mr. Durley about this?
A. I sought to interview Mr. Durley. He was out of the city on military service at the time.
Q. In other words, this particular transaction has not been corroborated by you with Mr. Durley, is that correct?
A. That is correct.
Q. All right. Isn't it a fact that after this transaction or alleged transaction, the applicant told you that he had been tempted to engage in some sort of skin contact with Mr. Durley but he had not actually done so.

* * *

THE WITNESS: I don't recall whether he said that or not.
Q. In other words, your best recollection now is that you can't say one way or the other, is that correct?
A. That is correct.
Q. And notwithstanding that you played the tapes covering that portion of the interview 7 to 10 days ago.
A. That is correct.

Appellant flatly denied, under oath what the agents said he had said, and in answer to an interrogatory, JA.64, Durley denied that the agents' version was true. Yet the Central Board adopted, in toto, the charges contained in the Statement of Reasons. Discussed, infra, point III.

but the agents' own version of what they thought appellant should have told them. In his affidavit, JA. 113, par. 11, Agent Beene relates that:

> "On several ocassions when Special Agent Schlichtman or myself found contradictions in Adams' answers to questions posed to him, we would reply, 'Didn't it really happen this way, Larry?', and proceed with what appeared to be the most reasonable or obvious course of action. Adams would respond to this form of interrogation by either remaining silent or indicating it did or did not happen in the manner described" (emphasis added).

Compare Scott v. U.S., 160 Ct. Cl. 152, at 154 (1963).

B. Intimidation Against the Assertion of Right to Counsel and Silence

But, perhaps most striking of all, is the fact that appellant was actually told that his clearance would be jeopardized if he attempted to assert any of the safeguards that even the interrogators had told him he had.[14/] Agent Beene, JA. 111, par. 4, says that he is "...reasonably certain that it was suggested to [appellant] that failure to answer pertinent questions regarding this alleged homosexual activity could look bad in the record and could go against him."[15/]

14/ It is indeed difficult to imagine a more chilling threat or one more calculated to intimidate than "[i]t was suggested to Adams that he might find himself repairing television sets instead of experimenting with lasers." Affidavit of Agent Beene, JA. 111, par. 4. See, also, appellant's affidavit, JA. 29, pars. 5 and 6.

15/ See, also, appellant's affidavit, JA. 28-29, par. 5, and JA. 33, par. 17.

The Fifth Amendment provides, in part, that: "no person shall... be deprived of life, liberty, or property without due process of law...". In its landmark security clearance case, Greene v. McElroy, 360 U.S. 474, at 492 (1959), the Supreme Court held that "...the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment...". Although the self incrimination clause of the Fifth Amendment is generally applicable in criminal cases, the Fifth Amendment's due process clause incorporates these protections when basic rights, such as liberty or property, are threatened by governmental action. In Greene, the Court held that due process requirements include the right to cross examine one's accusers in security clearance revocation proceedings. The Sixth Amendment, where the right to confront and to cross examine one's accusers is set forth, is,however, specifically applicable to criminal prosecutions.

This Court, in Powell v. Zuckert, 125 U.S. App. D.C. 55, 366 F.2d 634 (1966), focused on the necessity of government compliance with due process requirements normally applicable in criminal proceedings where employment rights are threatened. In that case a civilian electronics engineer appealed his discharge from employment with the Army. The Court, reversing the discharge, noted, at 366 F.2d 640, that:

> "It would seem wholly at odds with our traditions to allow the admission of evidence illegally seized by government agents in discharge proceedings, which the [Supreme] Court has analogized to proceedings that 'involve the imposition of criminal sanctions...' Peters v. Hobby, 349 U.S. 331 at 334, 75 S.Ct. 790 at 797 (1950)"; (and citing, inter alia, Greene v. McElroy, supra; and Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524 (1886)."

In the Powell case evidence used in the discharge proceeding was obtained in an illegal search of the employee's home in which government agents seized stolen materials introduced as evidence in the discharge proceeding. Particularly compelling is the fact that the Court cited Greene as the type of proceeding which is analogous to criminal proceedings.[16/] Similarly, in the Boyd case, upon which this Court also relied in Powell, the Court, at 116 U.S. 630, stated that the Fourth and Fifth Amendments "almost [run] into each other" and that the doctrines of those Amendments:

> "apply to all invasions of the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property... . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation...[of those Amendments]." (Emphasis supplied).[17/]

16/ However, the application of the standards of due process of the criminal law as embodied in the 4th, 5th and 6th Amendments are even more compelling in an industrial security clearance case where adverse action debars the subject not just from government employment but also from employment in his chosen profession in private industry. The liberty to follow one's chosen profession is a constitutionally protected right. See Parker v. Lester, 227 F.2d 708, at 717 (9th Cir., 1955).

17/ The Court also noted, at 116 U.S. 635, that: "constitutional provisions for the security of person and property should be liberally construed. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

The privilege against self incrimination, like other limitations on the government's conduct in criminal proceedings, is a part of the due process required of the government whenever individual rights are threatened by its actions.[18] In Application of Gault, 387 U.S. 1. (1967), the Court defined the self incrimination privilege as being part of due process that is applicable where a citizen's basic rights are imperiled (at 387 U.S. 20, 49):

> "Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the State may exercise...
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> * * *
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> "Against the application to juveniles of the right to silence, it is argued that juvenile proceedings are 'civil' and not 'criminal,' and therefore the privilege should not apply. It is true that the statement of the privilege in the Fifth Amendment, which is applicable to the States by reason of the Fourteenth Amendment, is that no person 'shall be compelled in any criminal case [the Court's emphasis] to be a witness against himself.' However, it is also clear that the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." (emphasis supplied).

In Miranda, at 384 U.S. 436 and 459-460, the Court restated the Constitutional premise underlying the right of an individual to remain free from compelled self incrimination:

18/ In Griswold v. Connecticut, 381 U.S. 479, at 484 (1965), the Court held that: "The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment."

"...the privilege has come rightfully to be recognized in part as an individual's substantive right, a 'right to a private enclave where he may lead a private life. That right is the hallmark of our democracy'." U.S. v. Grunewald, 233 F.2d 556, 579, 581-582 (Frank, J. dissenting), rev'd. 353 U.S. 391, 77 S.Ct. 963 (1957),

* * *

"The privilege [against self-incrimination] was elevated to constitutional status and has always been 'as broad as the mischief against which it seeks to guard'." Counselman v. Hitchcock, 142 U.S. 547, 562, 12 S.Ct. 195, 198 (1892).

In Spevack v. Klein, 385 U.S. 493 at 514, 515 (1967), the Court held that the privilege obtains in a disbarment proceeding, i.e.:

"...the Self Incrimination Clause of the Fifth Amendment...extends its protection to lawyers as well as to other individuals, and...it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it.

* * *

"In this context 'penalty' is not restricted to fine or imprisonment. It means, as we said in Griffin v. California, 380 U.S. 609, the imposition of any sanction which makes assertion of the Fith Amendment privileges 'costly'." (Emphasis supplied).

In a companion case, Garrity v. New Jersey, 385 U.S. 493, at 496-498 (1967), the Court further recited the foundation for its holding in Spevack:

"[W]e adhere to Boyd v. United States, [supra], a civil forfeiture action against property. A statute offered the owner an election between producing a document or forfeiture of goods the goods at issue in the proceeding. This was held to be a form of compulsion in violation of both the Fifth Amendment and the Fourth Amendment. ...It is that principle that we adhere to and apply in Spevack v. Klein.

* * *

> "The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent. That practice, like interrogation practices we reviewed in Miranda v. State of Arizona, [supra], is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice'."

As the Secretary's interrogators recognized, because they were obviously instructed to give the Fifth Amendment warning, the interrogation was the point at which the due process standards of the Fifth Amendment were applicable.[19/] That was the point at which appellant's liberty and property rights were jeopardized. See Shoultz v. McNamara, 282 F. Supp. 315, 321 (No. D. Calif., 1968). In this case appellant was summoned by government agents to an interrogation where he was never effectively advised of his right to remain silent, his right to counsel, or that what he said could be used against him. The brief warning he did receive was of no consequence in the interrogation which followed and in which the Secretary's agents actually refused him those rights. The use by the Secretary of uncorroborated and recanted admissions, either dictated to appellant by the agents or pried from him by promise and threat, is repugnant to the requirements of due process of law and provides an infirm basis for depriving appellant of rights guaranteed to him by the Fifth Amendment to the Constitution of the United States.[20/] Strikingly on point and compelling is Scott v. U.S.,

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19/ Compare the proceedure in the Civil Service Commission's suitability investigations where the individual is advised in advance by letter that an interview will be held and that he may be accompanied by counsel. Such a letter is part of the record. See JA. 123.

20/ Appellant took strong exception to and objected to use of the Special Agents' report and testimony. (See "Applicant's Memorandum in Opposition to Suspension of Access Authorization," JA. 69). Because the Central Board made no independent findings or conclusions discussed infra, Point III, appellant does not know how or it the Central Board treated his objections.

160 Ct. Cl. 152 (1963), in which a civilian employee of the Army, holding a security clearance for work on missile bases, was removed from his employment because of charges against him based solely upon admissions made by him in a lengthy interrogation after which he signed statements concerning his past sexual activities. The Court held that the Army's investigators' tactics were no less than "third degree" and that material so obtained were improperly admitted as evidence in removal proceedings. See, also, Saylor v. U.S., 179 Ct. Cl. 151 (1967).

In the Executive Order authorizing the security clearance program, JA. 124-128, the President clearly limited the manner in which the Secretary should conduct the program.[21/] Protection of the rights of individuals is a paramount premise in the President's Order, i.e.:

> "it is a fundamental principle of our Government to protect the interests of individuals against unreasonable or unwarranted encroachment...".

Nowhere in the Executive Order can any support be found for an interrogation that flies in the face of the due process clause of the Fifth

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21/ In Greene v. McElroy, supra, at 360 U.S. 507, the Court held that:

> "...it must be made clear that the President or Congress, within their respective constitutional powers, especially has decided that the imposed procedures [in appellee's security clearance proceedures] are necessary and warranted and has authorized their use."

See, also, Graham v. Richmond, 106 U.S. App. D.C. 288, 272 F.2d 517 (1959).

Amendment. Nor has Congress authorized such procedures. Where the Secretary's security clearance proceedings, which deprive individuals of protected rights, are infected by procedures unauthorized by the President or Congress and do not comport with due process of law, the proceedings are invalid. Greene v. McElroy, supra.

II. REVOCATION OF APPELLANT'S SECURITY CLEARANCE ON THE BASIS OF A WRITTEN STATEMENT PURPORTING TO RELATE THE SUBSTANCE OF CONVERSATIONS BETWEEN APPELLANT AND THE WRITER OF THE STATEMENT WHERE APPELLANT TESTIFIED UNDER OATH THAT THE STATEMENT WAS UNTRUE BUT WAS NOT AFFORDED AN OPPORTUNITY TO CONFRONT AND CROSS EXAMINE THE WRITER VIOLATED EXECUTIVE ORDER 10865, DEPARTMENT OF DEFENSE REGULATIONS AND THE DUE PROCESS CLAUSE.

In its Statement of Reasons, JA. 50, the Screening Board charged that:

> "In 1962, while [appellant] and John Rhodes Michael were working jointly on a local science fair project, [appellant] solicited the said Michael to engage in unlawful and immoral acts of sexual perversion."

The charge results from a statement taken from Michael on June 22, 1964 by Agent Beene (JA 65-68). The statement purports to relate the substance of conversaions between Michael and appellant two and one half years before. The portion of the statement that the charge rests upon, JA. 65, is that:

> "About 2 1/2 years ago Larry helped me do a science fair project in electronics. During that time when we were working together, I began to suspect him as a homosexual because of certain inferences he made. Finally he made several verbal approaches to me which I refused. By verbal approach, I mean he asked me to have homosexual relations with him."

In a letter containing further details concerning the Statement of Reasons, JA. 52, the drafter of the letter expanded upon what the Michaels statement actually says, i.e.:

> "During the early 1960's, while you were assisting a young friend, one John Rhodes Michael on a school science project which he was conducting, you repeatedly initiated and carried on discussions of homosexuality, and acknowledged to him that you were then and for some time past had been an active homosexual. On several occasions you sought to engage Michael in acts of mutual masturbation and oral copulation."

Because the Michaels statement is so vague, and only refers to conversations rather than to specific acts of homosexual conduct, the further detail was an obvious attempt by the Screening Board to relate specific conduct upon which an adverse action could stand.[22/] However, the Michaels statement does not support the specific conduct charged.

In his sworn statement,[23/] JA. 54, appellant denied the charge. Under oath, at the Field Board proceeding he denied the charge. At the Field Board proceeding, the Secretary's counsel produced the Michael statement

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22/ In the Statement of Reasons, JA. 50, the Screening Board relates that "[i]nformation available to the...Board indicates that you have engaged in criminal and immoral conduct and acts of sexual perversion and may continue to do so." The Board then sets out the Michael statement to support the charge and it based its conclusions upon the charge. But the Michael statement and the charge based thereon do not reveal any criminal or immoral conduct or acts of sexual perversion.

23/ "I deny that I ever 'sought to engage [John Rhodes]Michael in acts of mutual masturbation and oral copulation'. I similarly deny having 'repeatedly' initiated discussions of homosexuality with him, without, however, conceding that the content of my discussions as a private citizen can lawfully be censored by my Government through its power to deprive me indirectly of my livelihood."

and it was entered in the record by the examiner.[24/] Appellant was offered the opportunity to submit interrogatories to Michael but Michael did not appear at the proceeding. The Central Board found against appellant on the charges and attached derogatory significance to the further detail, JA. 58.

Section 4 of Executive Order 10865, JA. 126, which authorizes the security clearance program provides, in part, that:

> "An applicant shall be afforded an opportunity to cross-examine persons who have made oral or written statements adverse to the applicant relative to a controverted issue...". (emphasis supplied)

Neither of the exceptions to that section are met. No reason is apparent why the Secretary's counsel submitted the statement contrary to the President's order. The President specifically and unequivocally ordered the Secretary to produce live witnesses, not ex parte statements, and provided that only by so doing could adverse statements be entered in the record or provide a basis for adverse action.[25/] The duty was one resting solely on the Secretary. He cannot ignore the President's directions. Service v. Dulles, 354 U.S. 363 (1958).

24/ In his memorandum to the Central Board, JA. 69 at 70 , before the Board considered the case, appellant's counsel in the department proceeding objected to the use of the Michael statement and pointed out the conclusionary and tendentious nature of the statement.

25/ Section IV.D. 5 of the Secretary's regulations, JA. 146, provided that:

> "Department counsel is responsible for producing at the proceeding witnesses and information relied upon by the Department to establish those facts alleged in the Statement of Reasons which have been controverted."

Section IV.E.1.e., JA. 147, provided that:

> "After the proceeding has been convened...[the applicant may] cross examine witnesses produced by the Department of Defense."

The Executive Order provision above noted is an obvious response to Greene v. McElroy, supra, where the Court found that confrontation and cross examination in security clearance proceedings was a necessary element of the due process of law required in those proceedings. In Greene, at 384 U.S. 497, the Court, quoting Wigmore, noted that:

> "'For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross examination, and the conviction that no statement... should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.'" (Emphasis supplied)

Similarly, in Garrott v. United States, 340 F.2d 615,at 618 (Ct.Cl., 1965), the court, citing inter alia, Greene v. McElroy, supra, recited the necessity for cross examination in this type of proceeding, i.e.:

> "Within the past decade the principle has ripened, and is now in full maturity, that an agency of the Federal government cannot, without permitting cross examination and confrontation of adverse witnesses, take detrimental action against a person's substantial interests on loyalty or security grounds - unless, at the least, Congress (or the President, if he is the source of power) has expressly authorized the lesser procedure."

An opportunity to submit interrogatories where the real need is for probing cross examination is not an adequate substitute consistent with the requirements of due process of law.

In addition to being violative of the requirements of due process of law and inconsistent with Executive Order 10865, the Michaels statement is an inherently infrim basis for depriving an individual of protected rights because it contains nothing but inference and innuendo.

In Scott v. Macy, 121 U.S. App. D.C. 205, 207-208, 349 F.2d 182, 184-185 (1965), the Court considered the type of vague language that the Michael statement contains:

> "The stigmatizing conclusion was supported only by statements that appellant was a 'homosexual' and had engaged in 'homosexual conduct'. These terms have different meanings for different people. They therefore require some specification. The Commission must at least specify the conduct it finds 'immoral' and state why that conduct related to 'occupational competence or fitness'...The Commission may not rely on a determination of 'immoral conduct', based only on such vague labels as 'homosexual' and 'homosexual conduct', as a ground for disqualifying appellant for Government employment."
> (Emphasis supplied, footnotes omitted).

And see, particularly, Scott v. Macy II, ___ U.S. App. D.C. ___, 402 F.2d 644, at 648, footnote 8 (1968).

Appellant could not, of course, have been convicted in a criminal proceeding on the basis of such a statement. Neither can he lose substantial rights in a security clearance proceeding which is analagous to a criminal prosecution based upon such a statement. Powell v. Zuckert, 26/ supra.

26/ And see Doe v. C.A.B., 356 F.2d 699, at 701 (9th Cir., 1966), citing, inter alia, Greene v. McElroy, supra.

As the Greene opinion explicitly teaches, the standard of procedure, fairness and proof required to deprive a citizen of his basic rights are high. An adverse action resting upon the Michael statement meets none of these standards and is, as well, a violation of the President's directions to the Secretary.

III. REVOCATION OF APPELLANT'S SECURITY CLEARANCE ON THE BASIS OF ALLEGED HOMOSEXUAL ACTS VIOLATED THE DUE PROCESS CLAUSE BECAUSE THE SECRETARY HAS NO CLEAR STANDARD FOR EVALUATION AND NO FINDINGS OR CONSLUSIONS WERE ENTERED SHOWING A NEED FOR THE SECRETARY'S ACTION.

A. The Lack of Standards for Evaluation in Security Clearance Cases and the Secretary's Failure to Show that his Action was Necessary

The Secretary's regulations, Sec. III.B, JA. 138-141, contain a list of twenty-one criteria for application in security clearance cases. These criteria are meant to define past or present behavior, beliefs or associations that can result in the loss or denial of a security clearance. The impersonal sweep of the criteria encompass such a broad range of human activity that even the most virtuous person could well be fitted within their wide parameters. 27/

However, the Secretary, in the same section of his regulations, Sec. III.C, JA. 141, then urges his adjudicators to take a "common sense" approach, i.e.: "...the ultimate determination of whether an authorization should be granted or continued must be an over-all common sense one on the

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27/ Criteria 14, JA. 140:
"Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy."

basis of all the information which may properly be considered under this Regulation." Thus, the Secretary has erected criteria that could, because of their vagueness, apply to nearly all of the millions of his privately employed security clearance holders. The Secretary's direction on how these criteria are to be applied is similarly vague. He simply ordered his adjudicators, military officers,[28/] to apply their common sense. The application of that common sense does produce anomolous results. For example, in Department of Defense Docket No. OSD 66-44, a 25 year old applicant was granted a secret security clearance after he admitted that while in the Army in Korea in 1960 he had engaged in ten to twenty homosexual acts with a Korean national for his own gratification and, upon returning home, and while still in the Army, had engaged in one or two homosexual acts for which he was paid. The Secretary granted that clearance and denied appellant's at about the same time.[29/]

28/ The Central Board was composed of an Army, an Air Force and a Navy officer who had no personal opportunity to observe appellant.

29/ Because the Secretary publishes no opinions as do most administrative adjudicators he is not called upon to explain the inconsistencies of his actions. See Melody Music, Inc. v. F.C.C., 120 U.S. App. D.C. 241, 243, 345 F.2d 730, 732 (1965). The Fifth Amendment, while not containing an equal protection clause, does forbid discrimination that is so unjustifiable that it is violative of due process. Schneider v. Rusk, 377 U.S. 163 (1964). The apparent inconsistencies in appellant's and the above noted case points up the arbitrariness that obtains where standards to be applied are vague. The Secretary, in his"Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment," p. 79, in the District Court explained the inconsistencies in appellant's case and in OSD 66-44 by noting that the 25 year old applicant in OSD 66-44 was a reformed man and "...his impassioned averment at the hearing to the effect that if God had created anything more wonderful than heterosexual intercourse he had kept it to himself." Appellant can only wonder at decisions affecting constitutionally protected rights which are made on such a basis. In any event, appellant too testified that he was not a homosexual and had no homosexual desires or contacts. See, also, appellant's affidavit, JA. 33, par. 16.

In its recent decision in the second Scott case, Scott v. Macy, ___ U.S. App. D.C. ___, 402 F.2d 644 (1968), this Court had occasion to comment on the Civil Service Commission's seemingly contradictory policices concerning the employment of persons who have engaged in homosexual conduct. The Court's opinion makes clear the need for demarcation of policy by which persons subject to the policy may be guided, i.e.: "...public policy is in something of a state of flux, with old certainties dissolving and new ones unformed...we... note the importance and relevance of a clear policy line...". It is apparent that the Secretary has no policy at all to guide his security clearance holders and the military officers who adjudicate the basic rights of civilians. The absence of such standards is contrary to the requirements of due process of law.[30/]

In United States v. Robel, 389 U.S. 258 (1967) the Court, citing Executive Order 10865, the Secretary's regulations, and Greene v. McElroy, supra, stated:

> "The government can deny access to its secrets to those who would use such information to harm the nation." (Emphasis supplied).

A fair reading of the Robel case indicates that use, by the Court, of the word "would" is the crucial factor in determining whether a security deter-

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30/ See, also, Doe v. C.A.B., supra, at 356 F.2d 701, citing, inter alia, Greene v. McElroy, supra, and holding that where employment rights are effected by government action based on determinations of individual fitness the basis on which the government purports to act and the standards to be applied by the government must appear with the degree of exactness and certitude normally applicable to criminal statutes and proceedings.

mination by the Secretary that deprives a citizen of his livelihood is valid. The nexus between an individual's access to classified information in the course of his livelihood and the conclusion that he "...would use such information to harm the nation" must be established. Speculation or unsupported assumptions to establish that nexus are not enough. In Robel, the Court struck down a statutory provision that, "when a communist-action organization is under a final order to register, it shall be unlawful for any member of the organizations to 'engage in any employment in any defense facility" when the government prosecuted Robel, an admitted Communist who was employed at a defense facility. The underlying meaning of Robel seems to appellant to be well taken. If the government is to have the authority to deprive millions of citizens of jobs, as in Robel, or professions, as here, on security grounds the government must point to a clear and present danger that a breach of security is actually threatened. To say that a person may be subject to coercion, influence or pressure is not enough. Very few mortals are not subject to coercion, influence or pressure.

31/ At 389 U.S. 266-267:

"We are not unmindful of the congressional concern over the danger of sabotage and espionage in national defense industries, and nothing we hold today should be read to deny Congress the power under narrowly drawn legislation to keep from sensitive positions in defense facilities those who would use their positions to disrupt the Nation's production facilities. We have recognized that, while the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interests. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160. Spies and saboteurs do exist, and Congress can, of course, prescribe criminal penalties for those who engage in espionage and sabotage. The Government can deny access to its secrets to those who would use such information to harm the Nation. And Congress can declare sensitive positions in national defense industries off limits to those who would use such positions to disrupt the production of defense materials." (Emphasis supplied, footnotes omitted).

Similarly, in Schneider v. Smith, 390 U.S.17 (1968), the Court declared invalid the refusal of the Commandant of the Coast Guard to issue merchant seaman's papers to a former Communist who refused to answer the Commandant's interrogatories concerning his present and past associations, attitudes, and affiliations. In his complaint, the seaman alleged that: (1) he was loyal to the United States; (2) he had not been active in an organization of the Attorney General's list for 10 years; and, (3) he had never committed an act of sabotage or espionage or an act inimical to the security of the United States. The Commandant took the position that these factors were irrelevant to his determination. The Court, again relied upon the necessity to show a nexus between the danger envisioned and grant of the permit. 32/

The Screening Board's pre-adjudication conclusions, JA.50 , which are a rote recitation of four of the twenty-one "Criteria" contained in the regulations are the conclusions which the Central Board, without comment or elaboration, purports to adopt. These criteria are:

32/ See also Shelton v. Tucker, 364 U.S. 479 (1960); Schware v. Board of Bar Examiners, 353 U.S. 232, 238-239 (1957); Cole v. Young, 351 U.S. 553, (1956); Scythes v. Webb, 307 F.2d 905 (7th Cir. 1962); and Scott v. Macy, supra, at 349 F.2d 185:

"Appellant's right to be free from governmental defamation [refusal to hire] requires that the government justify the necessity for imposing the stigma of disqualification for 'immoral conduct'." (Emphasis supplied).

In Shachtman v. Dulles, 96 U.S. App. D.C. 287, 292, 225 F.2d 938, 943 (1955), the Court stated that "[f]or us to hold that the restraint upon the appellant, [a member of an organization on the Attorney General's list] is not arbitrary would amount to judicial approval of a deprivation of liberty [refusal to issue passport] without a reasonable relation to the conduct of foreign affairs." Based on his study in the 1940's, Professor Kinsey concluded that at least 37% of the American male population has at least one homosexual experience between the beginning of adolescence and old age. Kinsey, Sexual Behavior in the Human Male, p. 623 (1948).

"Criterion 14: The information set forth in [the charge] reflects behavior, activities, and associations which tend to show that you are not reliable or trustworthy.

"Criterion 17: The information...reflects acts of a reckless, irresponsible, or wanton nature which indicate such poor judgment and instability as to suggest that you might disclose classified information to unauthorized persons, or otherwise assist such persons, whether deliberately or inadvertently, in activities inimical to the national interest.

"Criterion 19: The information...furnishes reason to believe that you may be subjected to coercion, influence, or pressure which may be likely to cause you to act contrary to the national interest."

These criteria reflect a condemnation rather than a reasoned judgment of security needs. They are useless as conclusions that balance competing interests. Their application without reasoning which relates national security interests and the individual to whom they are applied is both arbitrary and represents a basic failure of the Secretary to draw a rational non speculative nexus between national security and the need to deprive appellant of basic protected rights.

Criterion 14, adopted by the Board, recites that appellant's behavior, activities and associations "...tend to show that he is not reliable or trustworthy." Any governmental action that deprives a citizen of a right on the basis of an allegation that his "associations" render him "not reliable or trustworthy" runs afoul of the First Amendment. See Shelton v. Tucker, supra. Such criteria is too imprecise to serve as a standard of regulation or as a basis for judgment. NAACP v. Button, 371

U.S., 415 (1963). Further, the record does not support the Board's adoption of the criteria. At the Field Board proceeding, JA. 38, the Secretary's counsel related that:

> "...information in the file in possession of Department counsel,discloses that of the persons interviewed [by appellee's special agents] during the course of the investigation, 11 professed to have known him for varying periods of time from his birth up until the present time in the capacity as neighbors, friends, and fellow workers, and all recommend him for a position of trust and responsibility."

Those who know him best think he is trustworthy and reliable and the record only supports a finding that appellant is trustworthy and reliable. The Board's decision is more than speculative, irrational and unbalanced. It is wrong and specious. "Deference to agencies does not reach the extent of sanctioning irrational agency actions." Tallman v. Udall, 116 U.S. App. D.C. 379, 385, 324 F.2d 411, 415 (1963).33/

The Board's adopted Criterion 17 and 19 are vague beyond reason. They are loaded with words such as "...suggest that you might...", "...reason to believe that you may...", and "...which may be likely to cause you...". On their face they fail to provide the reasoned and non-speculative nexus between appellant and the President's stated interest that is required by Robel.

33/ The Board's conclusion that appellant is untrustworthy or unreliable is further suspect because the Board had no opportunity to personally evaluate the appellant. See, particularly, Parr v. United States, 272 F.2d 416, 419 (9th Cir., 1959).

Further, the record is not clear on what standards were applied and whether there was an attempt to balance competing interests. In Gonzales v. Freeman, supra, at 334 F.2d 579, citing, inter alia, Greene v. McElroy, the Court held that "[t]he governmental interests on the one hand the individual interests on the other must be balanced."[34/]

Nor will the appellant accede to any presumption of administrative expertise. As stated in New York v. U.S., 342 U.S. 882, 884 (1952):

> "Unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, works the beginning of the end of liberty." (The Court's emphasis).

The Central Board was composed of three military officers who had no personal opportunity to observe appellant. The judgments of military officers who are subject to dishonorable discharge for a single incident of homosexual conduct[35/] may or may not provide a balanced view of an applicant in the different context of the security clearance revocation proceeding where the standards to which the officers are subject was wholly inapplicable. This is not to say there was bias or prejudice or that the Board did, in fact,

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34/ Compare the statement of the Secretary's counsel at the oral argument proceeding, JA. 99, before the Central Board:

> "I do not question Mr. Adams' professional qualifications in any way. He may be as eminently qualified as counsel has described him. However, it is not the function of this [B]oard, nor is this Board permitted to weigh the risk as against the needs for the man's talent. That is for determination at a higher level, if at all."

What higher authority counsel could have had in mind is a puzzle because the Board was responsible for the final decision to revoke appellant's clearance.

35/ See Schwartz v. Covington, 341 F.2d 537, 538 (9th Cir., 1965).

lack the expertise necessary to a reasonable determination. It is to say that those factors are unknown here because there is no reasoning in the record to support their result. Without the safeguard of the showing of a nexus as required by Robel, supra, the result can only be considered what it appears to be, conjecture.

B. The Central Board's Failure to Make Independent Findings Violated Due Process of Law Requirements

The charge based on the Michael statement is discussed in point II, supra. That statement was so vague and conclusionary that it could provide no basis for a finding adverse to appellant.

The other charge, i.e., numerous acts of sexual perversion from age 14 to July 30, 1964, is simply not supported by the record even if the record is read in a light most favorable to the Secretary.[36/] JA. 36-46, is an

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36/ For example, in its seven further details concerning the charge, JA.51 -52 , the Screening Board charged that appellant "...was introduced to homosexuality by [his stepfather]..." at age 14. The record, however, indicates that appellant was brutally assaulted by his drunken stepfather and was made physically ill by the experience. See JA. 37. When appellant was 15 years of age he earned money as a television repairman. The Board charged, JA. 51, that a customer made an advance which appellant resisted. That is hardly an act of sexual perversion. The Board charged, JA. 51, that appellant had engaged in an act of sexual perversion with one Benton Durley when appellant was 16 or 17 years old. Appellant denied the charge. Benton Durley denied the charge and the agent to whom appellant had supposedly acknowledged the act could not recall whether appellant had really made such an acknowledgment or not. See footnote 13, supra. The Board charged, JA. 52, that appellant had once gone to the Georgetown Grill, "...a bar frequented by homosexuals." That is not an act of sexual perversion.

excerpt from the "Memorandum in Support of Plaintiff's Motion for Summary Judgment" which analyzes the record's content on the charge. Notwithstanding the fact that the charges against appellant were controverted, that the record does not support the Screening Board's charges, and that competing interests must be weighed and balanced, the Central Board made no independent findings whatsoever. That failure was gross error.[37/]

In Spector v. Wilson[38/] Judge Holtzoff held that providing a copy of the Board's opinion to an applicant was not necessary because the applicant had a copy of the charges against him and the Secretary of Defense was acting consistently with is own regulations when he refused to provide the applicant with a copy of the Board's opinion. On the strength of Greene v. McElroy, supra, this Court reversed in a one line per curiam opinion. Spector v. McElroy, 106 U.S. App. D.C. 51, 269 F.2d 242 (1959). Individual determinations including findings of fact, reasoning and conclusions are particularly necessary elements of due process of law where, as here, competing interests which include an individual's basic rights are being weighed. Because findings which appraise

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37/ Appellee's regulations, Section IV.F.1, JA. 152, then provided that the field board report "shall not be made available to the applicant." Appellee's current regulations provide that the field board report shall be made available to applicants where an adverse determination is made by the field board.

38/ U.S.D.C., D.C. Cir., Case No. CA-4514-56, decided November 12, 1957. A transcription of the oral opinion as it appears in the Government Security and Loyalty Reporter is JA. 84.

appellant of the basis upon which the charges were resolved against him are not included in the record, the action is not consistent with the requirements of due process of law. Gonzalez v. Freeman, 118 U.S. App. D.C. 180, 179-180, 334 F.2d 570, 579-580 (1964), citing, inter alia, Greene v. McElroy, supra. See, also, Coleman v. Brucker, 103 U.S. App. D.C. 283, 257 F.2d 661 (1958); Olenick v. Brucker, 107 U.S. App. D.C. 5, 273 F.2d 819 (1959); Davis v. Brucker, 107 U.S. App. D.C. 152, 275 F.2d 191 (1960); and Van Bourg v. Nitze, ___ U.S. App. D.C. ___, 388 F.2d 557 (1967). Compare Section 557(c) of the Administrative Procedure Act, 5 U.S.C. Sec. 557(c), which is a statutory concept of due process of law in administrative proceedings.

CONCLUSION

For all the reasons previously noted, the District Court's order granting defendant's motion for summary judgment should be reversed, the case should be remanded to the District Court, and the District Court should be directed to enter an order granting plaintiff's motion for summary judgment and the relief sought by plaintiff in his complaint. Appellant requests such other and further relief as the nature of the case may require.

Respectfully submitted,

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January 31, 1969

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 22,506

ROBERT LARRY ADAMS,

Appellant,

v.

MELVIN R. LAIRD,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

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April 16, 1969

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CASES:

*Cases principally relied upon.

Although the Secretary and appellant have separately stated the questions presented to the Court, the Secretary's three questions and appellant's single question in three parts focus on (1) the interrogation of appellant by the Secretary's Special Agents, (2) use of the ex parte statement of John Rhodes Michael, and (3) the standards applied by the Secretary's military officers in making individual determinations whether to grant clearance and their failure to state facts and conclusions demonstrating the necessity for their actions. The Secretary's arguments are hereafter considered.

I. THE INTERROGATION

(a) The Secretary's Contention that Appellant has Mistakenly Relied on the Miranda Opinion

The Secretary agrees that the right to remain free of compelled self incrimination did obtain at the interrogation conducted by his Special Agents. The Secretary concedes the presence of that right when he opines (Br. 20) that "...the principal inquiry with regard to the admissibility of the statements must focus on whether...such statements were freely and voluntarily made and not the result of some impermissible influence over appellant's constitutional privilege not to be compelled to incriminate himself." He does argue (Br. 15-21) that appellant's reference to Miranda v. State of Airzona, 334 U.S. 436 (1966), is inappropriate because Miranda was a criminal

case. Miranda was cited in appellant's brief primarily because it contained a thorough review of actual interrogation practices that the Court found to be inherently coercive and to illustrate the use of all those practices by the Secretary's Special Agents in this case. It seems to appellant that Miranda provides the best possible insight into the nature of psychologically coercive interrogation.[1/] For that purpose it is invaluable.

Appellant will quite readily acknowledge that in the Miranda case the Court was dealing with criminal procedure. By his failure to attempt to demonstrate otherwise, the Secretary concedes that normally applied criminal law safeguards such as right to counsel and right to remain free of compelled self incrimination at interrogations are applicable in his security clearance cases. That is, after all, the teaching of Greene v. McElroy, 360 U.S. 474 (1959). Nowhere does he come to grips with the authority cited by appellant which demonstrates that the safeguards required in criminal proceedings are applicable whenever the government seeks to deprive an individual of constitutionally protected rights. See appellant's brief, pp. 18-25, citing, among other cases, Greene v. McElroy, supra; Spevack v. Klein, 385 U.S. 493 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967); and Powell v. Zuckert, 125 U.S. App. D.C. 55, 366 F.2d 634 (1966). The record in this case does demonstrate that the only means of guarding against coercive practices at the Secretary's interrogations is by the presence of counsel. The interrogation to which appellant

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1/ See, also, Griffiths and Ayres, A Postscript to the Miranda Project: Interrogation of Draft Protestors, 77 Yale L.J. 300, 305-319 (1967).

was subjected was, in any event, a deprivation of due process of law because of its coercive nature. The Secretary's interrogators' failure to advise appellant of his right to counsel was an element of that deprivation.

The Secretary's further argument (Br., p. 20) that Miranda is inapplicable because it is not retroactively applied is hardly compelling. Coercively obtained statements have never provided a valid basis for governmental action that interferes with basic rights whether those rights are jeopardized in a civil or in a criminal proceeding. See, particularly, Bong Youn Choy v. Barber, 279 F.2d 642, at 646-647 (9th Cir., 1960). The Internal Revenue cases cited by the Secretary (Brief, pp. 18-19) actually sustain appellant's position. For example, in United States v. Mackiewicz, 401 F.2d 219 (2nd Cir., 1968), a case chiefly relied on by the Secretary, the Court clearly recognized that if the admissions of a taxpayer at a civil investigation are, in fact, coercively obtained, the admission cannot be used. See 401 F.2d 222-223.

Although the Secretary does not directly challenge the presence of the privilege at his special agents' interrogations, he does seem to wish judicial sanction for conducting those interrogations in a manner that leaves the privilege without any force. He states (Br. 17) that there is an "inherent functional difference" between his security clearance programs which are "designed to insure the security of the United States" and the "prosecutive function at the center of the criminal action." Appellant has tried to no avail to

understand this functional difference. What is involved in either case are the basic rights of the individuals. When such rights are involved the Secretary is bound to abide by constitutional principles no less than a police officer [2] or a judge. The Secretary's belief in a functional difference is no basis to avoid judicial scrutiny of his agents' actions. [3]

(b) The Secretary's Contention that there was no Impermissible Influence at the Interrogation

The Secretary (Br. 20) asks "...whether the totality of the circumstances surrounding this interview...warrant a conclusion that such statements were freely and voluntarily made and not the result of some impermissible influence over appellant's constitutional privilege not to be compelled to incriminate himself." The Secretary answers his question affirmatively. The record speaks otherwise. The affidavits of appellant (JA. 27-35) and Agent Beene (JA. 110-114) quite clearly tell the story.

2/ The Secretary urges (Br., p. 16) that a basis for the Miranda opinion is the fact that "...it is extremely difficult to protect persons in the cutstody of the police from coercive interrogation practices carried on in secret...". That is exactly the fate appellant suffered at the hands of the Secretary's special agents.

3/ The Secretary states that appellant had an affirmative duty to cooperate with the interrogators (Br. 17). The Secretary's assertion is much too broad. See Shoultz v. McNamara, 282 F. Supp. 315 (No. D. Calif., 1968). If appellant had refused to answer specific questions and had the Secretary taken adverse action on that basis a different question with serious constitutional implications would be present. But the Secretary concedes a right to remain free from compelled self incrimination and he nowhere asserts that a duty to cooperate includes an obligation to submit to a third degree interrogation or to mental terror which is inherently inconsistent with that right. See Scott v. U.S., 160 Ct. Cl. 152 (1963) and Bong Youn Chov v. Barber, supra.

The Secretary bases his conclusion that there was a lack of impermissible influence largely upon the temporizing recitals in Agent Beene's affidavit. For example, the Secretary relates (Br. 24), referring to Agent Beene's affidavit, that Agent Beene "...subsequently advised that neither agent bore any personal hostility or antagonism toward appellant and appellant never expressed...". What possible use the Secretary envisions for Agent Beene's recital of his and Agent Schlichtman's states of mind is unknown to appellant. What occurred at the interrogation is substantially agreed upon by both the appellant and Agent Beene. A record of what actually happened is before the Court. The Secretary's post hoc rationalizing is no basis on which to decide this case.[4/] "It requires no stretch of the imagination to appreciate the mental terror the government officials' treatment caused [appellant]." Bong Youn Choy v. Barber, supra, at 279 F.2d 642.

The Secretary nowhere comes to grips with the parallel between what appellant here suffered and the interrogation practices found to be

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4/ Some of the Secretary's statements concerning what occurred at the interrogation are simply misleading. For example, he states (Br. 21) that the interrogation was arranged by "prior appointment." He neglects to add that the purported reason for the meeting was a blind and that the agents actually used a false pretext for obtaining appellant's presence at the interrogation. Elsewhere, the Secretary states that appellant "...was never told that his failure to answer a question, by exercising [his] right, would absolutely lead to an adverse determination" (Br. 26, the Secretary's emphasis). He was told, according to Agent Beene (JA. 111), that "...it was suggested...that failure to answer pertinent questions...could look bad in the record and could go against him." See also appellant's affidavit (JA. 28-29, 33).

coercive in Miranda, supra.[5/] See appellant's main brief, pp. 11-18. Appellant believes that the interrogation was, as a matter of law, conducted in a coercive manner.

II. THE MICHAEL STATEMENT

The Secretary argues (Br. 28-29) that the President has authorized a security clearance program that does not require confrontation or cross examination of persons who supply the adverse information upon which his military officers rely in making their determinations. The Secretary relies on Sec. 3 (7) of Executive Order 10865 (JA. 126) which provides, in part, that a security clearance may not be revoked unless the holder is given "...an opportunity to cross-examine persons either orally or through written interrogatories in accordance with Section 4...". Section 4(a) (JA. 126) specifies the procedure applicable where the Secretary intends to rely on written or oral statements that are "...adverse to the applicant relating to a controverted issue...". In that case, the Executive Order directs that the applicant "shall be afforded an opportunity to cross examine" the author of the statement. Appellant is, quite frankly, puzzled by the Secretary's reliance on Section 3 (7) which

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5/ The distinctions which the Secretary urges (Br. 26, fn. 10) between Scott v. U.S., 160 Ct. Cl. 152 (1963) and this case are hardly significant since every interrogation will, presumably, have a different set of facts and the interrogation practices discussed in Scott were also visited upon appellant. The Secretary in his attempt to distinguish is merely quibbling. It is interesting to note that in the Bong Youn Choy case, supra, after the interrogation was conducted the alien went home for the night. He returned in the morning and signed a statement which the Court had no difficulty pronouncing coerced even though the alien had left the premises of the interrogation and was completely beyond his interrogators' influence over night.

relates to evidentiary standards generally and does allow the use of interrogatories because Section 4(a) states in the clearest possible language that there shall be an opportunity to "...cross examine persons who have made oral or written statements to the applicant relating to a controverted issue...". The President has specifically directed that cross examination is a necessary element of the Secretary's proceedings and, as Greene v. McElroy, supra, teaches, confrontation and cross examination are a vital element of due process of law. In this case the opportunity to cross examine Michael was of particular importance because the statement is vague and loaded with inference and innuendo and because the circumstances under which the statement was taken by Agent Beene are unknown. See appellant's brief, p. 25-27. The Court, in Greene, noted that "...no safeguard for testing the value of human statements is comparable to that furnished by cross examination...". 384 U.S. 497. Certainly an offer to allow interrogatories was not comparable to the crucible for testing provided by cross examination. See Garrott v. United States, 340 F.2d 615, 618 (Ct. Cl., 1965).

The Secretary also argues (Br. 32) that appellant waived any right to cross examine Michael when appellant's counsel agreed to submit interrogatories to Michael. The examiner was obviously prepared to accept the statement notwithstanding the President's Order that appellant be allowed to confront and cross examine his accuser. It is difficult to determine how a right can effectively be waived in a proceeding where there is no intent to honor the right even if it

had been demanded. In effect, the Secretary's adjudicator believed then and the Secretary argues now that appellant did not have a right to confront or to cross examine his accuser. In Fay v. Noia, 372 U.S. 391, 439 (1963) the Court stated the guideline for determing whether there has been an effective waiver of a constitutional right:

> "The classic definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458, 464...'an intentional relinquishment or abandonment of a known right or privilege' - furnishes the controlling standard."

It can hardly be said that in this case that there was an intentional relinquishment of a known right. The Secretary denies its very existence. Given the context of the Secretary's proceedings, i.e., a hearing where one of the Examiner's first statements (F.B. Tr. 3) was that the "proceedings are not conducted with the formality of a court proceeding or an administrative hearing conducted under the Administrative Procedure Act...," it would not be surprising if counsel was unsure of what rights were available to his client. Certainly, appellant's attorney's failure to demand the right to confront and cross examine Michael cannot fully be attributed to trial tactics where the ground rules were so vague and where the Secretary even denies the existence in his proceedings of the constitutional right. See Wilson v. Gray, 345 F.2d 282 (9th Cir., 1965).[6/]

The Secretary, in a footnote (Br. 31, fn. 12), responds to appellant's argument that the Michael statement is exceedingly vague and contains nothing but inference and innuendo and does not support the charge which is based on the statement. See appellant's brief, pp. 25-26 and 29-30. The Secretary's footnote merely quibbles and his attempt to distinguish the language of Scott v. Macy, 121 U.S. App. D.C. 205, 349 F.2d 182 (1965) and ___ U.S. App. D.C. ___, 402 F.2d 644 (1968) is obscure. The fact remains that the Michael statement is a virtual monument to the testimonial infirmities of ex parte statements.

III. LACK OF STANDARDS AND FAILURE TO SHOW A NECESSITY FOR THE ACTION

The Secretary's effort to define the standard he uses for evaluation of security clearance applicants and holders is a recitation that his actions must be "clearly consistent with the public interest" (Br. 34-35).

6/ The Secretary's reference (Br. 32) to Williams v. Zuckert, 371 U.S. 531 (1963) and 372 U.S. 765 (1963) is misleading. In Williams, the Court held that because Air Force Regulations required the employee to arrange for the presence of adverse witnesses for purposes of cross-examination there was no deprivation of right where an employee failed to do so and consequently could not cross-examine the makers of adverse statements. In this case, the duty is solely on the Secretary and, indeed, except for the fact that appellant knew that one of the two charges involved Michael he had no way of knowing whether Michael himself was the source of the information or what Michael had said. At the hearing he was presented, for the first time, with the statement.

that he has criteria which are "optional guidelines" (Br. 36), and that the "ultimate authority repose[s] in [his military officers] to exercise their discretion in determining whether an applicant qualifies for security access..." Appellant, in his main brief (p. 36), pointed out the anomalies that result from the exercise of unbridled discretion by the Secretary's military officers. Appellant also pointed out that the Secretary's decision in this case is fatally flawed because his military adjudicators did not establish a rational basis for their action or demonstrate the necessity for deprivation of appellant's rights. A case principally relied upon by appellant is United States v. Robel, 389 U.S. 258 (1967). The Secretary, in a footnote (Br. 34, fn. 14), reports that he is "...bewildered by appellant's reference to...Robel...". The basis for his bewilderment seems to be that Robel is a case in which a criminal statute was found to be incompatible with the First Amendment. However, the Secretary resolutely refuses to heed the explicit language of the Robel opinion. Referring to Executive Order 10865, the Secretary's regulations and Greene v. McElroy, the Court stated that security access can be denied "...to those who would use such information to harm the nation." See appellant's main brief, pp. 32-34. The Robel opinion is crystal clear in teaching that government security and loyalty programs that disrupt individual employment must be directed only at those individuals who present a clear and present danger to the national security. The Secretary argues (Br. 36) that his military officers are authorized to disrupt or end the professional lives of civilians

if they discern a "rational basis" for doing so.[7] That frightening contention is not supported by any authority and is in conflict with the clear language of Robel.

Nor does the Secretary take effective issue with appellant's contention that the Central Board's failure to make independent findings and conclusions was a deprivation of due process of law. See appellant's main brief, pp. 34-40. The Secretary merely recites (Br. 40) that "...[e]ach decision... was the product of responsible discretionary action, after weighing all of the pertinent factors, and the final conclusion of the Central Board was propounded only after a thorough and comprehensive review of the entire administrative record." There is no record support whatsoever for the Secretary's statement and adoption of the Screening Board's preadjudication Statement of Reasons does not satisfy the requirements of due process of law.[8] The Secretary simply ignores the fact that the charges against appellant find no support in the record. See appellant's main brief, pp. 38-40.

7/ Ironically, the Secretary does not point to any rational basis in the record for depriving appellant of a security clearance. He merely relies on the discretion of his military officers.

8/ The Secretary asserts (Br. 39) that the Screening Board's initial action was an "adverse determination" and an "interlocutory conclusion." He states that from that point onward appellant was involved in "administrative review." The Screening Board's determination was made before appellant knew his clearance was threatened. He had no voice in the Screening Board's procedure whatsoever. If the Screening Board's decision is, in fact, an original adjudication and the Central Board's determinations are in the nature of review, the Secretary is violating the Executive Order (Sec. 3, JA. 125-126) and the most elementary requirements of due process of law.

CONCLUSION

For all the reasons noted herein and in appellant's main brief, the District Court's order granting defendant's motion for summary judgment should be reversed, the case should be remanded to the District Court, and the District Court should be directed to enter an order granting plaintiff's motion for summary judgment and the relief sought by plaintiff in his complaint.

Respectfully submitted,

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